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Ruling Dims Outlook for Coal-Fired Power Firms

Aging Plants Face Big Expense To Comply With Clean Air Act

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An Ohio court ruling could cloud the future for scores of old coal-fired power plants that have underpinned the economy and undermined air quality in the eastern United States, according to both sides in the court dispute.

On Thursday, U.S. District Judge Edmund A. Sargus Jr. in Columbus ruled that FirstEnergy Corp.'s Ohio Edison Co. had violated federal clean-air legislation in upgrading seven aging power generators without adequately improving pollution controls. Another trial to determine fines is scheduled for next year.

The decision is the first in a series of lawsuits brought by federal and state officials and citizens' organizations against operators of 51 power plants accused of similar violations of the 1970 Clean Air Act. Several of the power companies have settled with regulators.

The long-running dispute could take unpredictable legal or legislative turns in coming years.

Power-company officials hope that a new power-plant-emissions policy being developed by the Bush administration would counteract the Ohio decision.

But New York Attorney General Eliot L. Spitzer, a principal in the lawsuits against the utilities, said the decision increases pressure on the companies to negotiate agreements with the Environmental Protection Agency and the states to curb pollution. "If I were sitting where they are, I'd be very tempted . . . to settle," he said.

Executives at American Electric Power Co., which faces charges similar to those in the Ohio Edison case, were studying the Sargus ruling yesterday and had no immediate public response, spokesman Pat D. Hemlepp said yesterday. The AEP case is scheduled to be tried by Sargus in 2005.

"Don't look at our case and assume the FirstEnergy case weakens [our] arguments. We feel strongly we haven't done anything wrong," he said.

But if the Ohio ruling sets the precedent, owners of coal-fired plants built before 1970 would face hard economic decisions caused by the requirement to invest in very costly pollution controls.

Among them would be whether to close plants temporarily while seeking the EPA's permission to make repairs. Owners could even mothball some plants, some industry spokesmen said.

"They would have to install modern pollution controls" to remain open, said Shannon Fisk, staff attorney with the Environmental Law & Policy Center in Chicago, counsel for some plaintiffs suing the utilities.

"If the judge's interpretation of the Clean Air Act holds up -- and we believe it will -- the older and

dirtier coal-fired power plants would either have to clean up -- or eventually shut down. That's what the authors of the Clean Air Act intended," said Frank O'Donnell, executive director of the Clean Air Trust.

Another option would be converting coal-fired generators to run on natural gas -- a course chosen by Dominion, the Richmond energy company, and Cinergy Corp. in Cincinnati.

"If you are allowed to maintain these plants with normal maintenance procedures, many of these plants can continue to exist," said Frank Maisano, a spokesman for utility companies. If not, gas is the likely option, a switch that could push the current high price of natural gas even higher.

"These mostly grand-fathered units have operated much longer than Congress expected . . . in part because they do not bear the capital or operating costs of controlling emissions or upgrading their equipment," the National Academy of Public Administration wrote in an EPA-commissioned report to Congress in April.

But the emissions from older, dirtier plants cause thousands of premature deaths and "many thousands" of additional illnesses and chronic diseases annually, the academy study said.

The older plants were exempted from clean air requirements, but under a contentious federal doctrine called "new source review," they lose the valuable exemption if operators make major modifications, improvements or expansions. In those cases, utilities have to install costly up-to-date pollution controls.

The issue facing the entire industry is where to draw the line between routine maintenance and major modifications.

In the Ohio case, Sargus concluded that the utility's upgrades to its plants "were not routine in any sense of the word."

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